A.F.R. (57)

HIGH COURT OF CHHATTISGARH AT BILASPUR

First Appeal No. 208/2006

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Appellant (Defendant): Smt. Kunjbai widow of late Umend, service, Industrial Relationship Department, Contract Labour Section, Shed No. 61, Old Administrative Bhavan, Bhilai Steel Plant R/o village and post Khopali, P.S. Utai, Tah. & Distt. Durg (C.G.)

VERSUS

Respondent (Plaintiff) : Vishwanath Sahu son of late Amar Singh Sahu, aged about 55 years R/o House No. 1/B, Road-1, Sector-7, Bhilai Nagar.

APPEAL UNDER SECTION 96 C.P.C. R/w Order 41 Rule 1 of the Code of Civil Procedure, 1908

Present:-
Shri Surya Kant Mishra, counsel for the appellant.
Shri M.K. Bhaduri, counsel for the respondent.

ORAL JUDGMENT/~~ORDER~~
(Passed on this 3rd day of May, 2007)

Shri Surya Kant Mishra, learned counsel for the appellant did not press on application M.(C).P. No. 2231/2006 for grant of stay of execution which is accordingly dismissed as not pressed.

2. Both the learned counsel pray that this appeal be heard and disposed of finally at the stage of admission.

3. Heard finally.

4. Brief facts are that the respondent/plaintiff instituted a suit for recovery of Rs.1,94,400/- against the appellant/defendant on the basis of a promissory note dated 19.8.2000 executed by the appellant/defendant acknowledging the receipt of loan of Rs.81,000/- and also promising to pay interest @ 4% per month thereon.

5. The appellant/defendant resisted the suit and denied that any promissory note was executed by her or that any loan was advanced to her by the respondent/plaintiff.

6. The evidence of the respondent/plaintiff was closed on 8.11.2004. On 24.11.2004, 17.12.2004 and 17.01.2005, though the suit was fixed for recording the evidence of the appellant/defendant she did not keep her witnesses present. On 17.1.2005 i.e. the date for evidence an application under Order 6 Rule 17 C.P.C. was moved by the appellant/defendant alleging that she had learnt that the respondent/plaintiff who was an agent of Life Insurance Corporation of India and on whose motivation the appellant/defendant had opened an Account in L.I.C. and taken a policy on 9.9.2002, had during the course of opening of account, forged the promissory note dated 19.8.2000.

7. Upon such an application being filed on 17.1.2005, the First Additional District Judge adjourned the suit to 15.2.2005 for hearing on the application under Order 6 Rule 17 of C.P.C. On 15.2.2005, the appellant/defendant and her counsel remained absent. The learned lower Court closed the appellant/defendant's case and instead of proceeding to pronounce judgment again adjourned the suit to 21.2.2005. On 18.2.2005, the appellant/defendant moved an application under Order 9 Rule 7 of C.P.C. for being heard in answer to the suit while showing good cause for non-appearance on 15.2.2005. The lower Court rejected both the applications i.e. application under Order 6 Rule 17 of C.P.C. as also the application under Order 9 Rule 7 of C.P.C vide order dated 10.03.2005 and delivered the impugned judgment and decreed the suit for a sum of Rs.81,000/- along with interest @ 6% per annum from 19.8.2000 till payment in favour of respondent/plaintiff.

8. Shri Surya Kant Mishra, learned counsel for the appellant contended that the rejection of application under Order 6 Rule 17 of C.P.C. as also the application under Order 9 Rule 7 of C.P.C. by the lower Court was contrary to law and has occasioned failure of justice. It was urged that upon an application being filed under Order 6 Rule 17 of CPC, the suit was adjourned for reply on the said application. Therefore, the lower Court erred in closing the evidence of the appellant/defendant on 15.2.2005. It was also urged that the order dated 10.3.2005, rejecting the application under Order 9 Rule 7 of C.P.C. was contrary to law since the lower Court instead of taking a pragmatic and liberal view rejected the application on a highly technical ground. On these premises, it was urged that while allowing the appeal and the applications under Order 9 Rule 7 and Order 6 Rule 17 of C.P.C. the matter should be remanded to the lower Court for giving an opportunity to the appellant/defendant to adduce evidence. On the other hand, Shri M.K. Bhaduri, learned counsel for respondent//plaintiff argued in support of impugned judgment and decree.

9. Having heard rival contentions, I have perused the record of Civil Suit No. 01-B/2005. It is pertinent to note that on 17.1.2005 fixed for recording the evidence of the appellant/defendant, upon filing an application under Order 6 Rule 17 of CPC by the appellant/defendant, the suit was adjourned to 15.2.2005 for reply on the said application. Instead of deciding the application under Order 6 rule 17 of C.P.C. on 15.2.2005 and thereafter fixing a date for recording evidence of the defendant, or proceeding *ex parte* against the defendant on 15.2.2005 and adjourning the hearing of suit for the next date, the lower Court closed the opportunity of the defendant to lead evidence and thereafter, also rejected the

application under Order 9 Rule 7 of C.P.C. filed by the appellant/defendant wholly on untenable grounds.

10. The lower Court failed to notice that the defendant had shown sufficient cause for non-appearance on 15.2.2005 and had with due diligence filed the application under Order 9 Rule 7 of C.P.C. on 21.2.2005. The lower Court also failed to notice that the promissory note did not bear signature of any witnesses and the facts sought to be amended were material for just decision of the suit.

11. Under Order 17 Rule 3 C.P.C. if on the adjourned date of hearing for recording evidence the defendant remains absent, the Court has no option but to proceed under Order 17 Rule 2 C.P.C., which reads as under:

> **2. Procedure if parties fail to appear on day fixed.---** Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.
>
> *Explanation.*---- Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

12. The explanation to rule 2 applies only where a part of the evidence of any party has been recorded and such party fails to appear on any date to which the hearing of the suit is adjourned. It is only in such a case the Court has jurisdiction to proceed with the case as if such party was present. In this case, the evidence of the defendant had not begun and therefore, on 15.2.2005 the Court could not close the evidence of the defendant since it had not even begun.

13. I am of the considered opinion that by shutting the opportunity of the defendant to lead evidence before it had begun, on a date fixed for reply of the application under Order 6 Rule 17 C.P.C. and also by rejecting the applications under Order 9 Rule 7 and Order 6 Rule 17 of C.P.C., failure of justice has occasioned. This is a fit case in which after allowing the applications under Order 9 Rule 7 and Order 6 Rule 17 of CPC, the matter should be remanded to the lower Court.

14. The appeal is allowed. The applications under Order 9 Rule 7 of C.P.C. as also under Order 6 Rule 17 of C.P.C. are allowed. The learned lower Court shall after giving opportunity to the appellant/defendant to incorporate the amendment and giving opportunity to the plaintiff for making consequential amendment, if any, and to the parties to lead evidence shall thereafter decide the suit on merits. Parties are directed to appear before the lower Court on 26th June, 2007. On receipt of a copy of this order, the trial Court shall endeavour to decide the suit in accordance with law within a period of three months from the date of appearance i.e. 26th June, 2007.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Kvr